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Supreme Court of the United States

October Term, 1974

No. 74-655

SAMUEL C. CARRATT, JR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the state trial court, i.e., defendant and Commonwealth. References in the Statement of Facts herein, to the state court record, will be to the appropriate pages of the transcript of the pre-trial hearing referred to subsequently herein.

QUESTIONS PRESENTED

The questions presented by the defendant are set out in his brief herein. For reasons set forth below, the Commonwealth submits that some of these questions are not properly before this Court for review. However, the Commonwealth will adopt the language of the defendant in his brief as to the subject matter of the questions he is presenting.

STATEMENT OF MATERIAL PROCEEDINGS

The defendant was indicted by the grand jury of the County of Albemarle, Virginia, on November 2, 1972, for the conduct of an illegal gambling business in violation of § 18.1-318.1, Code of Virginia (1950), as amended. This indictment was returned pursuant to the arrest of the defendant on July 16, 1972, following a search of the defendant's home which was conducted pursuant to a search warrant issued earlier that same day, and the seizure of certain items of evidence therefrom, which related to the operation of a "numbers racket."

Defendant filed a pre-trial motion to suppress the evidence obtained as the result of said search and seizure on the grounds that the search warrant was defective for technical reasons and that it was illegally executed by means of an unannounced no-knock entry. Hearings on this motion before the Circuit Court of Albemarle County were held on November 17, 1972, and November 24, 1972. The defendant did not challenge the sufficiency of probable cause for the issuance of the search warrant, and conceded that such probable cause was shown in the affidavit for the warrant. Furthermore, the defendant did not raise any objection at the trial court level to the effect that no-knock entries can

only be used after a showing of probable cause before a magistrate and after obtaining the prior approval of the magistrate.

Pursuant to said hearings, the trial court held that the search warrant was not defective nor was it illegally executed. The trial court also found that for all practical purposes this was factually a no-knock entry, although there was a limited attempt by the officers to first knock and identify themselves. The trial court did find that the affidavit for the search warrant indicated that the search was desired to investigate a violation of § 18.1-318.1 of the Code, whereas the language of the search warrant itself indicated that it was issued to search for evidence in violation of § 18.1-340 of the Code. Inasmuch as the indictment was for a violation of § 18.1-318.1 and the search warrant itself was issued for a violation of § 18.1-340, then, according to the holding of the trial court, the evidence seized pursuant to such warrant could only be used in a prosecution for a violation of § 18.1-340.

This holding of the trial court was objected to by the Commonwealth as being a more limited view than the law requires. The trial court did not grant the defendant's motion to "suppress the evidence," but only limited the Commonwealth as to what offenses could be prosecuted through the use of the evidence. The specific language of the trial court was as follows:

> "The court doesn't find any lack of probable cause for these officers going into that building without knocking, but it does find that the defendant should not be prosecuted for any crime with this evidence other than that which is alleged in the search warrant. . . . I'm not sustaining the [defendant's] motions as such as to excluding or rejecting the evidence. What I'm saying is that it's going to be limited to certain purposes. . . ."

The trial court treated its ruling as having the effect of granting a motion to quash the indictment. (See transcript of trial on December 12, 1972, p. 28; Appendix in Virginia Supreme Court, p. 120).

Thereafter, the Commonwealth procured an indictment from a special grand jury on November 27, 1972, wherein the defendant was charged with feloniously and unlawfully operating, conducting, or being concerned in managing a lottery commonly known as the numbers game or the numbers racket in violation of § 18.1-340 of the Code of Virginia (1950), as amended. The defendant's previous pretrial motion to suppress the evidence was renewed prior to his trial on this new indictment, and all of the proceedings and evidence taken at the previous hearing were incorporated by reference into the record of this proceeding.

At defendant's trial on December 12, 1972, he entered a plea of not guilty and was convicted by the jury of the misdemeanor of possession of lottery paraphernalia, primarily upon the evidence obtained pursuant to the search warrant referred to above, and was sentenced to twelve months in jail and a fine of $500.00.

The defendant appealed his conviction to the Virginia Supreme Court, and his petition for a writ of error was granted, and after full briefing and oral argument by the parties the Virginia Supreme Court affirmed his conviction. The only issues presented to the Virginia Supreme Court, as set out in defendant's brief, were as follows:

> "A. Should the evidence seized under the search warrant be excluded because the warrant failed to specify an offense in relation to which the search was to be made as required by Rule 3A:27?
>
> "B. Should the evidence seized under the search warrant be excluded because there were no exigent circumstances permitting a no-knock entry?"

In his brief in the Virginia Supreme Court, the defendant devoted approximately eight pages of argument to issue "A" above, and added at the end thereof one paragraph devoted to the point which he is now raising in question "C" in his Petition for a Writ of Certiorari herein.

In approximately nine pages of argument on issue "B" above, the defendant did not raise the question of whether prior judicial authorization is required before a no-knock entry can be made, other than to mention the fact that some states have such a requirement.

Following the opinion and ruling of the Virginia Supreme Court, the defendant filed a "Petition for Rehearing" with that Court in which he raised again and reiterated his arguments on the issue of probable cause to justify the no-knock entry; and in which he further raised the issue of whether the trial court's ruling on the admissibility of the evidence in a prosecution for a violation of § 18.1-318.1 of the Code of Virginia should have the effect of making such evidence inadmissible for any purpose. (Question Presented "C" in the Petition for a Writ of Certiorari herein.)

The Petition for Rehearing was summarily denied by the Virginia Supreme Court, without setting forth any reasons.

STATEMENT OF FACTS

At the hearing on the motion to suppress on November 17, 1972, Lieutenant Higgins of the Albemarle County Police Department and Investigator Deavers of the Virginia State Police testified as to the manner of execution of the search warrant and as to the information and facts within their knowledge prior to said execution. According to that testimony, the two officers proceeded towards the front of

defendant's house and went first to a door which they later found entered into the garage of the house and not into the main part of the house itself. They knocked on the screen door in front of that door, tried it, and found it to be locked, and proceeded to a second door nearby. Again they knocked on the screen door and identified themselves as State Police. No one answered, and they pulled the screen door open and knocked on the inner main door and again identified themselves as State Police. No one answered that knock, and Lieutenant Higgins proceeded to break the door open with his foot. The entire process of knocking on the doors and identifying themselves from the moment they arrived at the first door until the moment they were in the house took approximately one minute. As stated previously, the trial court determined that this did in fact constitute a no-knock entry.

Prior to their arrival at the home of the defendant, Investigator Deavers and Lieutenant Higgins, through surveillance and through information obtained from a reliable informant, had learned that the defendant owned a large dog who barked loudly whenever anyone came onto the defendant's premises and whom they considered to be possibly vicious. (Tr., pp. 54, 60, 61, 71, 81). They also received information that the defendant had a gun, that he was capable of using it, and that they should be careful because he could be dangerous. Further, the information was that this was a .38 caliber weapon and that the defendant kept it loaded in the vicinity of the bedroom. (Tr., pp. 61, 62, 78). The officers also had been advised by their reliable informant that the defendant would destroy the evidence they were seeking if he had any idea whatsoever that the police officers were coming to his home. It was felt that the method of destruction would be by flushing it down the

drain. They were advised by the informant that there might possible be rice paper on the premises being used by the defendant in the suspected numbers operation, and the officers knew of their own knowledge that this rice paper is easily disposed of by flushing because it is water soluble. (Tr., pp. 79-82, 62, 63). In addition, the officers, through information obtained by their own surveillance, were of the opinion that the defendant had recognized them as police officers in the process of that surveillance, on the day preceding the search, and that the secrecy of their investigation was jeopardized. This was one of the primary reasons why the search was conducted when it was, because the officers felt the defendant was now aware that he was under surveillance and would probably change his method of operation. Conversation among the officers was to the effect that the defendant might know that the officers were coming. (Tr., pp. 62, 79).

Lieutenant Higgins testified that his thoughts at the time that they were executing the search warrant were that there was a possibility that the defendant might be armed with a gun, that he might have seen the officers coming into the driveway, and would be reluctant to come to the front door. (Tr., p. 61). Investigator Deavers testified that the principal reason for making a decision to enter the premises without first knocking and advising the persons inside of who they were and what they were there for was the fact that the reliable informant had stated that the evidence would be destroyed by the defendant as soon as he learned that police officers were coming to his house, and that the evidence would be destroyed immediately. Another reason was the fact that there might possibly be some danger if the defendant were alerted prior to the officers entering his house. (Tr., p. 84).

At the trial itself, prior to the introduction of evidence, the defendant renewed his motion to suppress. In addition to the parties stipulating the evidence from the previous hearing, the state police investigator, Carl Deavers, testified that the informant who had provided all of the information about the defendant, which Deavers had previously testified about, was the same informant referred to in the affidavit for the search warrant. Deavers further testified that the informant's information as to Carratt's intention to destroy any evidence before the police got to it was received by the informant from Carratt, the defendant personally.

The information in the affidavit showed that the informant had given information to the police on six prior occasions in the past three months which had led to the arrest and convictions of persons for felonies, and that the informant is a "reputable citizen in the Charlottesville-Albemarle community." In addition the affidavit showed that the informant had had frequent direct contact with defendant's numbers operation and with the people involved in it.

At the hearing on the motion to suppress, the trial court expressly limited the evidence to only that information known by the police officers at the time they executed the warrant and did not allow any evidence to be presented as to what was found after the officers obtained admission to the defendant's premises. The ruling of the trial court on the question of whether the no-knock entry was justified was, therefore, limited solely to the knowledge of the officers at the time they executed the warrant and was in no way affected by any occurrences which took place after the officers were in the defendant's home. However, at the trial on December 12, 1972, Lieutenant Higgins testified that after they were in the defendant's house, the defendant proceeded to

walk into a room that contained his office and office desk and attempted to grab a paper bag, at which point Lieutenant Higgins placed him under arrest and struggled with the defendant over possession of the paper bag. Lieutenant Higgins hollered for help, and Investigator Deavers came to his assistance, and they subdued the defendant and obtained possession of the paper bag. Many of the contents of the paper bag were scattered throughout the floor, and it was this bag and all of its contents which were eventually admitted into evidence against the defendant as paraphernalia representative of the operation of a numbers racket. The Commonwealth's position was that this evidence was additional justification for the assumption by the officers prior to executing the warrant that the defendant would attempt to destroy the evidence before it could be obtained by the police officers.

LAW AND ARGUMENT

A. Was It Error To Rule That Probable Cause Existed For A No-Knock Entry Of The Petitioner's Home In Violation Of The Fourth And Fourteenth Amendments To The Constitution Of The United States?

The possibility of the existence of exigent circumstances in the execution of search warrants without a prior announcement of identity and purpose has been recognized by this Court in at least three cases. See *Miller* v. *United States*, 357 U.S. 301, 2 L.Ed.2d 1332, 78 Sup.Ct. 1190 (1958); *Ker* v. *California*, 374 U.S. 23, 10 L.Ed.2d 726, 83 Sup.Ct. 1623 (1963) (separate opinion); and *Sabbath* v. *United States*, 391 U.S. 585, 20 L.Ed.2d 828, 88 Sup.Ct. 1755 (1968). A prohibition against a no-knock entry is statutory in many states, as well as under certain federal statutes. [See *Hinson*

v. *State*, 236 Md. 518, 204 A.2d 516 (1964)]. However, judicial exceptions to that prohibition are allowed, even in some of the states which have statutes. In fact, no-knock entries, under exigent circumstances, have been upheld in a number of jurisdictions in a number of cases. *Johnson* v. *Commonwealth*, 213 Va. 102, 189 S.E.2d 678 (1972); *Hinson* v. *State*, *supra*; *Commonwealth* v. *Manduchi*, 189 A.2d 613 (Pa. 1964); *State* v. *Clarke*, 242 So.2d 791 (Fla. 1970); *State* v. *Christiana*, 249 La. 247, 186 So.2d 580 (1966); *People* v. *Maddox*, 46 Cal.2d 301, 294 P.2d 6; *Scull* v. *State*, 122 Ga.App. 696, 178 S.E.2d 720 (1970); *State* v. *Linder*, 190 N.W.2d 91 (Minn. 1971); *State* v. *Juliano*, 97 N.J. Super.Ct. 28, 234 A.2d 236 (1967); *Waugh* v. *State*, 3 Md. App. 379, 239 A.2d 596 (1968); *People* v. *Lujan*, 484 P.2d 1238 (Colo. 1971); *People* v. *Shelton*, 311 P.2d 859 (Cal. 1957); *People* v. *McIlwain*, 28 N.Y.A.D.2d 711, 281 N.Y.S. 2d 218 (1967); *People* v. *Hammond*, 9 Cal.Rptr. 233 (1960); *People* v. *Villanueva*, 33 Cal.Rptr. 811 (1963); *People* v. *DeLaSierra*, 91 Cal.Rptr. 674 (1970); *People* v. *Gonzales*, 92 Cal.Rptr. 660 (1971); *Masiello* v. *United States*, 317 F.2d 121 (D.C.Cir. 1963); *Gilbert* v. *United States*, 366 F.2d 923 (9th Cir. 1966).

The possible exigent circumstances recognized in *Ker* v. *California*, *supra*, were (1) if the officer's peril would be increased, and (2) if the officer's purpose would be frustrated, such as by quick and easy destruction of the evidence. A factor considered significant in *Ker* was the fact that the officers reasonably believed that the suspect would be expecting the arrival of the police, and would therefore be in a better position to destroy the evidence before it could be seized.

These same exigent circumstances were recognized by the Virginia Supreme Court in the instant case [*Carratt* v. *Com-*

monwealth, 215 Va. 255, 205 S.E.2d 653 (1974)], and in *Johnson* v. *Commonwealth, supra,* as follows:

> "These exceptions have been made because of exigent circumstances and where the facts make it evident that the officer's purpose is known, or where announcement might frustrate the arrest, increase the peril of the arresting officer or permit the destruction of evidence. . . ."

What these cases recognize is that suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would have if he had first announced his entry and purpose and waited for a reply. As pointed out in *Kaplan,* "Search and Seizure, a No Man's Land in the Criminal Law," 49 Cal.L.Rev. 474, ". . . it would seem that the perfection of small firearms and the development of indoor plumbing through which evidence can quickly be destroyed, have made [statutes requiring notice in entry before the use of force to enter] . . . a dangerous anachronism. In many situations today . . . a rule requiring officers to forfeit the valuable element of surprise seems senseless and dangerous."

The Commonwealth maintains that in the instant case, the police officers who executed the warrant did have sufficient information and facts received through a reliable informant, as well as through their own observation, which created the necessary exigent circumstances to justify a forcible, unannounced entry of the defendant's premises. First of all, the officers had been advised that the defendant had a gun, that he was capable of using it, that it was a .38 caliber revolver, that he kept it in his bedroom, and that the officers should be careful because of this gun, and because the defendant could be dangerous. Secondly, the police

had had the defendant's home and his comings and goings under surveillance for some time, and from this surveillance, the officers had personal knowledge that the defendant's house was located in such a way that they could not get close to the house without being detected, and that the defendant had a large dog that barked loudly upon the entry of a person onto the defendant's premises. Furthermore, the officers also believed that the surveillance had been discovered by the defendant, and for this reason the defendant would likely be expecting the officers to come and search or arrest him at any time.

Lastly, and most importantly, the officers had been advised that the defendant had personally told the informant that he would destroy the evidence if he had any idea whatsoever that the police officers were coming to seize that evidence. In addition, the police had reason to believe, although they did not know for sure, that much of the evidence they sought would possibly be on water soluble or "rice paper" and, therefore, be very easily disposable by flushing it, and that this was the method indicated by the defendant to the informant as to how he would, in fact, dispose of the evidence. They also knew that such rice paper was commonly used in a numbers operation, and could be disposed of instantly by contact with water.

This accumulated information and knowledge of the officers prior to their entry met all of the exigent circumstances specified in *Ker*, even though that case refers to them in the alternative rather than in the cumulative. The officers in the instant case had facts which made it evident that the officers' purpose would be known, that an announcement might increase the peril of the arresting officers and frustrate the possibility of arrest, and that an announcement prior to entry would permit the destruction of evidence by a defendant who was, in fact, intent on doing just that. The state-

ment of the defendant that he would destroy the evidence had been made to the citizen informer direct, and the citizen informer was known by the officers to be not only reliable but also a reputable citizen in the community. Therefore, the officers possessed facts which gave them probable cause to believe that the defendant was not only capable of destroying the evidence because of the possibility of easily destroyable paper and the presence of indoor plumbing on the premises, but further that the defendant was planning to, in fact, destroy the evidence if given the opportunity.

Contrary to a statement in the petitioner's brief herein, the information obtained by the officers was not "generalized statements about human conduct." To the contrary, it was specific information about this particular suspect and his specific intentions as told by him to a reputable and reliable citizen.

In addition, the defendant asserts that the police had limited information about the possible danger to the police officers executing the warrant. The information they had was that defendant had a gun easily accessible to him in the bedroom, that he was capable of using it and would do so, that he was to be considered dangerous, and that his specific intention was to prevent the police from seizing any of the evidence on the premises. This alone would justify a no-knock entry under *Ker*, without the additional factor as to the possible destruction of evidence. One would be hard-pressed to find any more reasonable grounds for use of a no-knock entry than those existing in the instant case.

The defendant, in his brief herein, has cited a number of lower court decisions to support his assertions that the no-knock entry was not justified. The Commonwealth submits that all of those cases are easily distinguishable factually and legally, and are of no precedential value.

Lastly, the defendant suggests that the information provided by the unidentified informant was lacking in reliability, citing a number of previous decisions of this Court. (See pp. 7, 8 of Petition for Writ of Certiorari). All of the cases cited by the defendant involve situations where the reliability of the informant in question was not established by direct evidence, and had to be established by independent, circumstantial facts.

Therefore, those cases are easily distinguishable from the instant case where the informant was a reputable citizen of the community and had, on a number of previous occasions, provided information which led to the arrest and conviction of persons for felonies. In addition, it was obvious that the informant had been frequently and intimately exposed directly to the defendant and his confederates and their numbers operation. He had personally talked to the defendant and had received much of his information directly from the defendant. He had participated in the numbers operation and knew how it operated. He was acquainted with many of the defendant's associates and was in a position to learn much about the defendant from them.

Even if the information concerning the defendant's gun was hearsay to the informant, it was reliable because of the informant's closeness to the defendant and his operation, and because the informant himself was a very reliable individual.

Clearly, the information available to the police officers at the time they executed the search warrant, when considered in the totality of the circumstances, and not as broken down into many little independent pieces as the defendant would attempt to do, provided the necessary exigent circumstances to justify a no-knock entry.

B. Were Petitioner's Rights Under The Fourth Amendment Violated By The Police Officer's Failure To Obtain A Warrant Authorizing A No-Knock Entry?

The defendant did not raise this issue at trial, nor did he raise it on appeal to the Virginia Supreme Court. Therefore, he is precluded from raising it now before this Court. *Parker v. North Carolina,* 397 U.S. 790, 25 L.Ed.2d 785, 90 Sup.Ct. 1458 (1970).

In his Petition for a Writ of Certiorari herein, the defendant asserts that he did raise this issue on appeal. However, a thorough reading of the facts will show that this was not the case. As set out above, the "Question Presented" to the Virginia Supreme Court, as set out in defendant's own brief therein, was as follows:

> "B. Should the evidence seized under the search warrant be excluded because there were no exigent circumstances permitting a no-knock entry?"

This is clearly not the same issue he is now raising to this Court in part "B" of his Petition for a Writ of Certiorari. The only reference to this issue in defendant's Virginia Supreme Court brief was the following language as part of defendant's argument in support of the question set out above.

> "States which have considered the question of justification for a no-knock entry have given great respect to the conclusion of an independent magistrate that an unannounced entry was necessary. The reason is apparent: a detached judicial officer stands between the all too frequent over-zealous police officer and in this case the recognized fact that a person engaged in illegal activity will dispose of damaging evidence. That the suspect may have made such a statement does not add one thing to what everyone already knows. Before an officer is entitled to rely on such a statement to execute an unan-

> nounced entry he should possess facts given in probable cause to rely on this information. He should know when the statement was made and under what circumstances, and have probable cause to believe that the defendant is in the position to destroy the evidence."

This is simply not a sufficient presentation of a separate issue such as to warrant a full determination by an appellate court.

More importantly, the Virginia Supreme Court did not confront that issue, and made no finding or conclusions as to it. Therefore, there has been no decision of the Virginia Supreme Court from which a Writ of Certiorari can be granted as to this issue. The Commonwealth submits that the Petition for a Writ of Certiorari should, therefore, not be granted.

Even if it were assumed that this issue were properly before this Court, the Commonwealth submits that it is without merit. Case law in both Virginia and in this Court is to the contrary. Absolute predetermination of probable cause by a magistrate is not required by the Fourth Amendment, since warrantless searches and seizures are permitted in a number of situations. In the instant situation, whether exigent circumstances exist to justify a no-knock entry can only be determined at the time a search warrant is executed, since it is the facts known to the officer at that moment that are controlling. See *Parsley* v. *People*, 109 Cal.Rptr. 563 (1973). The type of exigent circumstances referred to in *Ker* v. *California*, *supra*, cannot always be known at a time somewhat in advance of the actual search, when a magistrate would necessarily have to act, but might often depend on observations made by the officers immediately prior to a search. The concept of "exigent circumstances" itself is in contrast to the type of magistrate predetermination sought by the defendant herein. The Commonwealth submits that such a view is not

only unworkable practically, but is simply not in accordance with present authority.

C. Having Once Suppressed The Evidence In A Prosecution Of The Petitioner, The Trial Judge Could Not Later Allow The Evidence To Be Used Against The Petitioner In Another Prosecution.

Initially the Commonwealth submits that the defendant's factual underpinnings for this question are incorrect, and therefore the conclusions drawn therefrom are also incorrect. The state trial court judge did not "suppress the evidence" in question as asserted by the defendant.

As pointed out in the Statement of Facts above, the search warrant under which the search was conducted specified that the search was to be for items in connection with a violation of § 18.1-340, Code of Virginia (1950), as amended. When the Commonwealth sought a prosecution of the defendant for a violation of § 18.1-318.1, Code of Virginia (1950), as amended, the state trial court judge held that the evidence seized pursuant to said search warrant could not be used in that initial prosecution. The trial court judge specifically denied that he was suppressing the evidence and stated that he was only limiting the Commonwealth as to what offenses could be prosecuted through the use of such evidence. The state trial court judge found no lack of probable cause for the issuance of the search warrant or for the manner of its execution and held that it was a valid search and that all items seized pursuant to said search were legally and properly seized. The trial court judge treated his ruling as having the effect of granting a motion to quash the indictment, not as granting a motion to suppress the evidence.

Therefore, the Commonwealth submits that the trial court did not find any lacking of probable cause of any kind and did not suppress the evidence, and the argument

of the defendant herein is totally without merit, since it is based upon an assertion that there was a suppression of evidence by the trial court judge.

Secondly, the Commonwealth submits that once again defendant is trying to raise before this Court by way of a Petition for a Writ of Certiorari an issue that was not properly raised and presented to the Virginia Supreme Court on direct appeal. A review of the questions presented to the Virginia Supreme Court as set out in the Statement of Material Proceedings herein, shows that this issue was not presented by the defendant to the Virginia Supreme Court in his appellate brief. Although the defendant did include one paragraph in the brief in relation to this issue, once again the presentation of that issue was not sufficient so as to properly present it to the Virginia Supreme Court. Even more importantly, the Virginia Supreme Court in its opinion specifically stated that this issue was not before it. Respondent says, therefore, that under the authority of *Parker* v. *North Carolina*, *supra*, that the certiorari should not be granted on an issue that has not been properly presented to the Court below.

The defendant did attempt to belatedly raise this issue to the Virginia Supreme Court by way of a petition for rehearing. However, the law is clear and long-standing that the Virginia Supreme Court is limited on rehearing to a consideration of the issues that were properly presented to it in the petition for appeal previously filed. *Tazewell* v. *Herman*, 103 Va. 416, 60 S.E. 767 (1908). Consequently, this issue was never presented to the Virginia Supreme Court in a proper or timely manner.

Lastly, the Commonwealth submits that the question presented by the defendant in this last issue is totally without merit. Under the existing case law authority throughout this country, the ruling of the state trial court in the instant case,

so as to prevent the seized evidence from being used in the initial prosecution for a violation of § 18.1-318.1 was incorrect. It has long been held that evidence seized pursuant to a valid search warrant can be used in the prosecution of a crime other than the one for which the warrant was originally obtained, and that officers can validly seize evidence in addition to those matters specifically mentioned in the search warrant itself. *Warden* v. *Hayden*, 387 U.S. 294, 18 L.Ed.2d 782, 87 Sup.Ct. 1706 (1967); *Johnson* v. *United States*, 293 F.2d 539 (D.C.Cir. 1961); *United States* v. *Eisner*, 297 F.2d 595 (6th Cir. 1962); *Artis* v. *Commonwealth*, 213 Va. 220, 191 S.E.2d 190 (1972). Respondent submits that since the action of the state trial court was favorable to the defendant, and since that action was, in fact, incorrect, that at the very most it was harmless error to the defendant. Since the Commonwealth does not have a right of appeal in Virginia, there was no opportunity to review the finding of the state trial court in this case that prohibited the initial prosecution under the initial indictment. However, the Virginia Supreme Court in its opinion in the instant case recognized that such a valid argument could be made. Respondent says, therefore, that even assuming the issue was properly before this Court it is totally without merit. In addition, the Commonwealth submits that this is not an issue of federal Constitutional magnitude, but merely one of state law and procedure, and therefore not a proper issue for the granting of certiorari.

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the trial court or by the Virginia Supreme Court, and that the decision of the Virginia Supreme Court in this case is in line with prior decisions of this

Court. Furthermore, it is asserted that not all of the issues raised before the Court in the Petition for a Writ of Certiorari were actually presented to the Virginia Supreme Court and are, therefore, not properly presented to this Court at this time. Therefore, the Commonwealth prays that certiorari not be granted and that the conviction of the defendant be affirmed.

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CERTIFICATE OF SERVICE

I certify that three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were this 14th day of February, 1975, mailed to James H. Michael, Jr., Michael and Dent, Ltd., 414 Park Street, Charlottesville, Virginia 22901, attorney for petitioner.

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